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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548*[Protest of Exclusion From Obtaining Forest Service Coni*

FILE: B-200092

DATE: March 6, 1981

MATTER OF: Edward R. Jereb

DIGEST:

Forest Service excluded retired employee from contract for architect and engineering services even though employee was highest-ranked competitor for services. Exclusion was improper since GAO is not aware of any basis for excluding retirees from obtaining Government contracts.

Mr. Edward R. Jereb protests the Forest Service's decision not to enter into price negotiations with him for an architect and engineering (A&E) contract involving surveying services in Klamath National Forest located in Region 5 of the Forest Service. Mr. Jereb, a retired Forest Service employee, had been selected for negotiations under the procedures prescribed by the Brooks Bill, 40 U.S.C. § 541 et seq. (1976). Thereafter, the contracting officer, Klamath National Forest, requested "approval for [sole-source] contracting to a retired employee." Nevertheless, the Chief of the Forest Service disapproved the contracting officer's request to negotiate with Mr. Jereb. Mr. Jereb contends that the Forest Service negotiated an A&E contract with him in 1979, notwithstanding agency policy limiting contracting with retirees and that, therefore, it should be required to do so here where he had been found to be most qualified to perform the required services.

Based on our analysis, we sustain the protest.

In Paul F. Pugh and Associated Professional Engineers, B-198851, September 3, 1980, 80-2 CPD 171, we summarized the A&E selection procedure established by the Brooks Bill as follows:

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"Selection procedures for A&E services prescribe that the requirement be publicly announced. An evaluation board set up by the agency then reviews statements of qualifications and performance data already on file and statements submitted by other A&E firms responding to the public announcement. * * * The board must then hold discussions with no less than three firms regarding anticipated concepts and the relative quality of alternative methods of approach for providing the services. The board prepares a report for the selection official ranking in order of preference no fewer than the three firms considered most qualified. The selection official makes the final choice of the three highest-ranked firms and negotiations are held with the highest-ranked A&E firm. If the contracting officer is unable to reach agreement with that firm on a fair and equitable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee."

After an initial evaluation of qualification and performance data submitted, as contemplated under the A&E procedures, the evaluation board for these services held discussions with the contending firms and Mr. Jereb. The evaluation board then finally evaluated each firm and reduced its judgment to a numerical score. Mr. Jereb received the highest score and Olson and Associates (Olson) was second with 16 fewer points; Engineering Consultants, Inc. was ranked third. The Chief of the Forest Service subsequently disapproved the contracting officer's request to negotiate the required services on a "sole-source" basis with Mr. Jereb because the "selection was not via competitive price bidding but rather by a panel of * * * employees who used the judgmental approach." Thereafter, Olson was awarded the A&E contract which was recently completed.

The Director of Administrative Services, Forest Service, states: "We feel that as a general policy awards to retirees should be avoided unless no other alternative is available." The Director states that this is especially true when price competition is not present as in this case and the difference is as minimal as 16 points out of a possible 1,840.

Mr. Jereb argues that the Forest Service has adopted inconsistent interpretations of its procurement regulations governing contracting with retirees as evidenced by the 1979 A&E contract awarded to him and by the refusal to contract with him for these services. Those regulations provide:

"4G-1.302-70 - Contracts between Government and retired Government employees.

* * * * *

(b) Policy. Employment procedures will be used to obtain the services of retirees, unless for nonpersonal services under circumstances excepted below:

(1) Solicitation by bid invitation.

* * * formally advertised contracts [may be] awarded to retirees * * * when they are the low responsible bidders on solicited bids offered to all sources of supply and open to price competition.

(2) Solicitation by proposal.

* * * negotiated contracts [may be] awarded to retirees * * * when they are the low responsible offerors on proposals offered to all sources of supply and open to price competition.

(3) Solicitation by proposals from sole source.

Proposals may be solicited and negotiated contracts awarded to retirees * * * on a

sole source basis only under circumstances provided below:

* * * * *

(c) Sole source procedures and approvals.

(1) * * * the [contracting] officer * * * shall include the following information in his request.

* * * * *

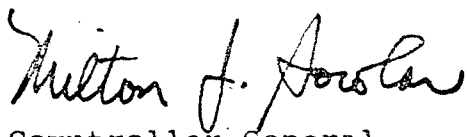
(iii) List of possible sources of supply other than the proposed sole source, and reasons they are not considered qualified."

In our view, none of the above contracting "circumstances" precisely apply to A&E contracting procedures. Obviously, circumstances (1) and (2), describing advertised and competitively negotiated contracts--both of which involve price competition--do not apply to A&E contracting procedures where price is not considered until after selection of the proposed awardee is made. Contracting circumstance (3), solicitation from sole source, although characterized by the lack of price competition (as is the case with A&E contracts), contemplates situations where the retiree involved is deemed the only "source of supply" for the contract requirement. However, A&E procurements contemplate that several sources of supply are available for the A&E contract. (In this procurement, for example, there were two other qualified sources.) Another difference between A&E procurements and sole-source procurements is that A&E procurements involve a degree of competition on factors other than price especially involving "anticipated concepts and the relative quality of alternative methods of approach for providing the services;" by contrast, there is no competition on any basis for a sole-source contract.

We appreciate the Forest Service's desire to avoid the appearance of favoritism by limiting awards of contracts, in the case of retired Government employees, to procurements where price competition has

been obtained or where no other source was available. However, the effect of the policy in the case of A&E procurements is to exclude retirees entirely, since price competition is not obtained for A&E contract awards. We question whether such a policy is justified in the absence of any law or Government-wide regulation sanctioning the exclusion. We recognize that there is a policy against awarding contracts to current Government employees, but this policy is embodied in Federal Procurement Regulation § 1-1.302-3 (amend. 95, 1964 ed.). We find no such Government-wide regulation applicable to retired Government employees. In the absence of such a law or regulation, we believe the Forest Service has no basis to implement a policy the effect of which is to exclude a class of bidders (retired Government employees) from obtaining awards of A&E contracts. To this extent, we think the Forest Service policy is improper. Therefore, we find that Mr. Jereb was improperly excluded from the competition.

Protest sustained; however, we cannot recommend action to correct the improper award since the contract has been performed. Nevertheless, we are recommending that the Secretary of Agriculture eliminate the Forest Service policy which permitted the exclusion. We are also recommending that the Director, Office of Federal Procurement Policy, consider whether a comprehensive regulation concerning contracting with retired employees should be issued as part of the proposed Uniform Procurement System.


Acting Comptroller General
of the United States